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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFONSO GARCIA MEDINA,

Defendant and Appellant.

2d Crim. No. B232519  
(Super. Ct. No. 1347829)  
(Santa Barbara County)

Alfonso Garcia Medina appeals a judgment following conviction of solicitation of murder. (Pen. Code, § 653f, subd. (b).)<sup>1</sup> We affirm.

*FACTS AND PROCEDURAL HISTORY*

In October 2009, Medina and his wife Carolina separated after an eight-year marriage.<sup>2</sup> Carolina soon filed a petition to dissolve the marriage.

Following her separation from Medina, Carolina became friends with Jose Pereyra, a single father and special education employee. Pereyra did not believe that he and Carolina were dating or that the relationship was more than a friendship. Carolina contacted Pereyra frequently, however, and moved to Guadalupe to live closer to him. She informed Medina that she had a relationship with Pereyra and wanted to live with him.

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<sup>1</sup> All further statutory references are to the Penal Code.

<sup>2</sup> We shall refer to Carolina Medina as "Carolina," not from disrespect but to ease the reader's task.

In March 2010, Carolina allowed Medina to share her apartment in Guadalupe. Although Medina hoped to rekindle their relationship, Carolina was not interested. Pereyra was "okay" with Medina living with Carolina, and urged her to "work things out."

Thereafter, "out of the blue," Pereyra received unusual text messages and voicemails. Some messages stated that Medina and Carolina were staying in hotels together and included photographs of them. Another message contained sounds similar to the "dry firing" of a semi-automatic handgun. Yet another message stated that Pereyra "had to pay [the] tax." Annoyed and perplexed, Pereyra responded that "there is nothing going on . . . just leave me alone."

On three occasions, Pereyra saw Medina drive by Pereyra's neighborhood or high school workplace in a Scion automobile. Pereyra did not know Medina, but he identified him at trial as the driver of the automobile.

Following the strange text messages, voicemails, and drive-bys, Pereyra decided to give Carolina "the cold shoulder" and not see her anymore.

*Solicitation of George Melina*

*(Count 2)*

After moving into Carolina's apartment, Medina met a neighbor, George Melina. Melina, a convicted felon, abused drugs and was a confidential informant for the police. Medina confided in Melina that Carolina was divorcing him and asked Melina "to kill [Carolina's] boyfriend." Medina informed Melina that he wanted Pereyra dead and out of his life. Medina provided Melina a photograph of Pereyra as well as Pereyra's telephone number and Guadalupe address. Medina also gave Melina \$900 in cash and \$23,000 in jewelry. Melina pawned the jewelry for \$4,000. On May 4, 2010, Medina complained to Guadalupe police officers that his home had been burglarized and televisions, jewelry, and cash, among other things, had been taken.

*Solicitation of Detective Valencia*

*(Count 1)*

On June 2, 2010, Santa Barbara Sheriff's Detective Mark Valencia recorded a telephone call between Melina and Medina. Melina informed Medina that "Oso," his "good homey," would telephone Medina and would "get it done." Medina stated that Carolina and Pereyra had reconciled following an argument. Melina responded that he would "get that handled," to which Medina replied, "O.K., cool." Medina also stated that he would have photographs and Pereyra's address available. For his assistance to law enforcement in the matter, Melina was released from jail and placed on electronic monitoring.

Later that day, Detective Valencia telephoned Medina and pretended to be Oso, a professional "hit man." During the telephone conversation, Medina stated that a "home wrecker" was involved in his marriage and that he wanted the problem solved. Valencia suggested that they meet in person to discuss the matter.

On June 3, 2010, Valencia met Medina at an Oxnard fast-food restaurant. Valencia recorded the conversation which was also observed by police officers stationed nearby. During the meeting, Valencia described his professed military training and assassin experience and stated that he would kill Pereyra for a discounted price of \$5,000. Medina stated that he wanted Pereyra "out of the picture" and that he wanted Valencia to "kill that little shit," and "make him disappear." Medina suggested that Valencia enter Pereyra's home through a window and "blast" him, or stage a "carjacking gone wrong." He also stated that he did not require proof of Pereyra's death. At the conclusion of the meeting, Medina gave Valencia photographs of Pereyra, his automobile, his residence, and his contact information.

A few days later, Valencia telephoned Medina, who informed him that he was no longer interested in his services.

Sheriff's deputies later requested Medina to visit the sheriff's station to discuss the reported burglary of his apartment. Upon Medina's arrival, he was arrested for soliciting murder and advised of his constitutional rights. During a later police interview, Medina

learned that "Oso" was Detective Valencia. Medina then explained that he did not want Pereyra killed and had only wanted Oso to "like scare him."

At trial, the prosecutor played recordings of the telephone call between Melina and Medina, the Oxnard meeting between Oso and Medina, and the police interview of Medina.

At trial, Medina testified that he did not solicit Melina or Valencia to kill Pereyra. He stated that he met Valencia in Oxnard only to discuss surveillance of Pereyra. Medina explained his purpose in meeting Valencia as: "Just to beat [Pereyra] up, to rough him up, get him out of the picture, do some background search on him . . . see if he was actually selling drugs or beating upon women or my wife. . . ." Medina also stated that he feared Valencia and went along with the discussion because he believed Valencia might harm him.

The jury convicted Medina of one count of soliciting murder, but it was unable to agree on another count of soliciting murder (count 2, pertaining to Melina). The trial court sentenced Medina to an upper-term of nine years, ordered him to pay an \$1,800 restitution fine, an \$1,800 parole revocation restitution fine, and a \$40 court security fee, and awarded him 593 days of presentence custody credit. (§§ 1202.4, subd. (b), 1202.45, 1465.8.) In selecting the upper-term of imprisonment, the trial judge explained that the crime concerned threats of great violence and vicious cruelty and involved sophisticated planning, particularly with respect to bringing photographs of the victim to the meeting with Valencia. The trial judge also stated that Medina did not accept responsibility for his criminal behavior.

Medina appeals and contends that: 1) the trial court erred by not instructing sua sponte regarding entrapment; 2) the prosecutor committed misconduct during summation by misstating the reasonable doubt standard; and 3) the trial court abused its discretion by sentencing him to an upper term of imprisonment.

## DISCUSSION

### I.

Medina argues that the trial court prejudicially erred by not instructing sua sponte with the defense of entrapment. (*People v. Salas* (2006) 37 Cal.4th 967, 983 [trial court shall instruct on any affirmative defense for which the record contains substantial evidence].) He contends that sufficient evidence supports the defense, claiming that the idea of solicitation of Pereyra's murder originated with Melina and Valencia. Medina asserts that Valencia frightened and intimidated him and he responded with false bravado because he feared Valencia, a professional hit man, would harm him.

The test for entrapment in California focuses on police conduct and is an objective test. (*People v. Watson* (2000) 22 Cal.4th 220, 223.) "Entrapment is established if the law enforcement conduct is likely to induce a *normally law-abiding person* to commit the offense." (*Ibid.*) It is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other acts likely to induce a normally law-abiding person to commit the crime. (*Ibid.*) Application of the entrapment defense depends upon whether "the intent to commit the crime originated in the mind of defendant or in the mind of the entrapping officer." (*People v. Benford* (1959) 53 Cal.2d 1, 10.)

On appeal, the reviewing court reviews the record to determine whether substantial evidence supports the claimed defense to require the trial court to instruct regarding entrapment. (*People v. Salas, supra*, 37 Cal.4th 967, 982; *People v. Federico* (2011) 191 Cal.App.4th 1418, 1422.)

The trial court did not err by not instructing regarding entrapment because substantial evidence does not support the defense. There is no evidence of law enforcement conduct generating a motive for the crime such as friendship or sympathy. (*People v. Watson, supra*, 22 Cal.4th 220, 223.) Nor is there evidence that law enforcement made the crime unusually attractive, such as a guarantee that the offense would go undetected. (*Ibid.*) The recordings of the telephone call and meeting between Valencia and Medina do not reflect threats or overbearing conduct by Valencia inducing Medina to hire him to kill

Pereyra. Medina stated that he wanted Pereyra "out of the picture," and suggested a staged carjacking as the method of killing. Valencia gave Medina an opportunity to "just walk away" and "that's cool," but Medina stated, "I want to do this." Medina also provided Valencia with photographs of Pereyra, his residence, his automobile, and his contact information. Although Medina subjectively may have feared Valencia due to his professed assassin experience, entrapment focuses on the objective conduct of law enforcement.

In sum, Valencia did not offer Medina any special enticement to commit the crime nor did he threaten him. Valencia also gave Medina several opportunities to step back from his plan to have Pereyra killed. There is no evidence of law enforcement conduct "likely to induce a normally law-abiding person to commit the crime." (*People v. Watson*, *supra*, 22 Cal.4th 220, 223.)

## II.

Medina asserts that the prosecutor misstated the reasonable doubt standard during summation by stating that reasonable doubt is "[a] doubt with a reason you can attach to it. A reason you can articulate to your fellow jurors. . . . Reasonable doubt is a reason with something you can articulate and communicate and defend to your fellow jurors, and if it is not something that is reasonable then it is not reasonable doubt." Medina argues that the misstatement of reasonable doubt lessened the prosecutor's burden of proof and required a juror harboring a reasonable doubt of guilt to defend his decision. Medina contends that the error is prejudicial.

For several reasons, we reject Medina's contention. First, Medina did not object to the prosecutor's statement of the reasonable doubt standard.<sup>3</sup> "In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review." (*People v. Gonzales* (2011) 51 Cal.4th 894, 920.) Any harm flowing from the prosecutor's remarks here would have been cured by an appropriate

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<sup>3</sup> Medina objected to the prosecutor's statements regarding lead Detective Neil Gowing doing "everything by the book, he followed all proper procedure and protocol." The statements regarding Gowing were an aside during the statements regarding reasonable doubt and elicited Medina's objection of improper argument.

admonition. There is therefore no reason to excuse Medina from the general requirement of a timely objection and request for an admonition. (*People v. Green* (1980) 27 Cal.3d 1, 34-35 [prosecutor partially misstated reasonable doubt standard], overruled on other grounds by *People v. Martinez* (1999) 20 Cal.4th 225, 239, *People v. Guiton* (1993) 4 Cal.4th 1116, 1129, and *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 35-36 [prosecutor misstated reasonable doubt standard].)

Second, the prosecutor's statements did not assert that a juror with reasonable doubt would be required to explain and defend his decision to fellow jurors. Moreover, the trial court instructed that the jury must disregard the argument of counsel if that argument conflicted with the instructions. (CALCRIM No. 200 ["You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions"].) The court also properly instructed with CALCRIM No. 220, concerning reasonable doubt. We presume the jury followed the court's instructions. (*People v. Avila* (2006) 38 Cal.4th 491, 574.)

### III.

Medina contends that the trial court abused its discretion by sentencing him to an upper term of nine years. (§ 1170, subd. (b) ["When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court"]; *People v. Sandoval* (2007) 41 Cal.4th 825, 847 [trial court abuses its discretion by relying upon irrelevant or improper sentencing factors].) He points out that he has no criminal history, was employed as an engineer, had marital problems, and asserts that the crime was a mere misunderstanding. Medina argues that the court improperly considered factors that are elements of the offense, i.e., the crime involved great violence and vicious cruelty. (*People v. Moberly* (2009) 176 Cal.App.4th 1191, 1197.) He also challenges the court's statement that he demonstrated criminal sophistication, pointing out that Medina instructed him to bring photographs of the intended victim to the meeting with Valencia. Medina adds that he has no prior criminal record and is not a danger to society.

The trial court possesses discretion to select among the lower, middle, or upper terms of imprisonment without stating ultimate facts deemed to be aggravating or mitigating, and without weighing aggravating and mitigating circumstances. (*People v. Sandoval, supra*, 41 Cal.4th 825, 847.) "[A] trial court is free to base an upper term sentence upon any aggravating circumstance that the court deems significant, subject to specific prohibitions." (*Id.* at p. 848.) The court's discretion to identify an aggravating circumstance is limited by the requirement that it be reasonably related to the sentencing decision. (*Ibid.*)

The trial court did not abuse its discretion by imposing the upper term of imprisonment based upon Medina's "planning, sophistication, or professionalism" in carrying out the offense. (Cal. Rules of Court, rule 4.421(a)(8).) Planning and sophistication do not inhere in the crime of solicitation of murder. Medina provided Valencia with photographs of Pereyra, his residence, and his automobile, as well as his contact information. In the recording, Medina states that he knew "what [Pereyra] drives and his daily routine." Medina also suggested methods of killing Pereyra – climbing through his apartment window and "blast[ing]" him or a "carjacking gone wrong." Moreover, Medina spoke to more than one person concerning the killing. Sufficient evidence supports the trial court's decision to impose the upper term based upon the circumstances of the solicitation of Pereyra's murder.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.



Edward H. Bullard, Judge  
Superior Court County of Santa Barbara

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